

Offshore Indirect Transfers: Taxing the Sale of Mining Assets – Primer from Land- based mining practices

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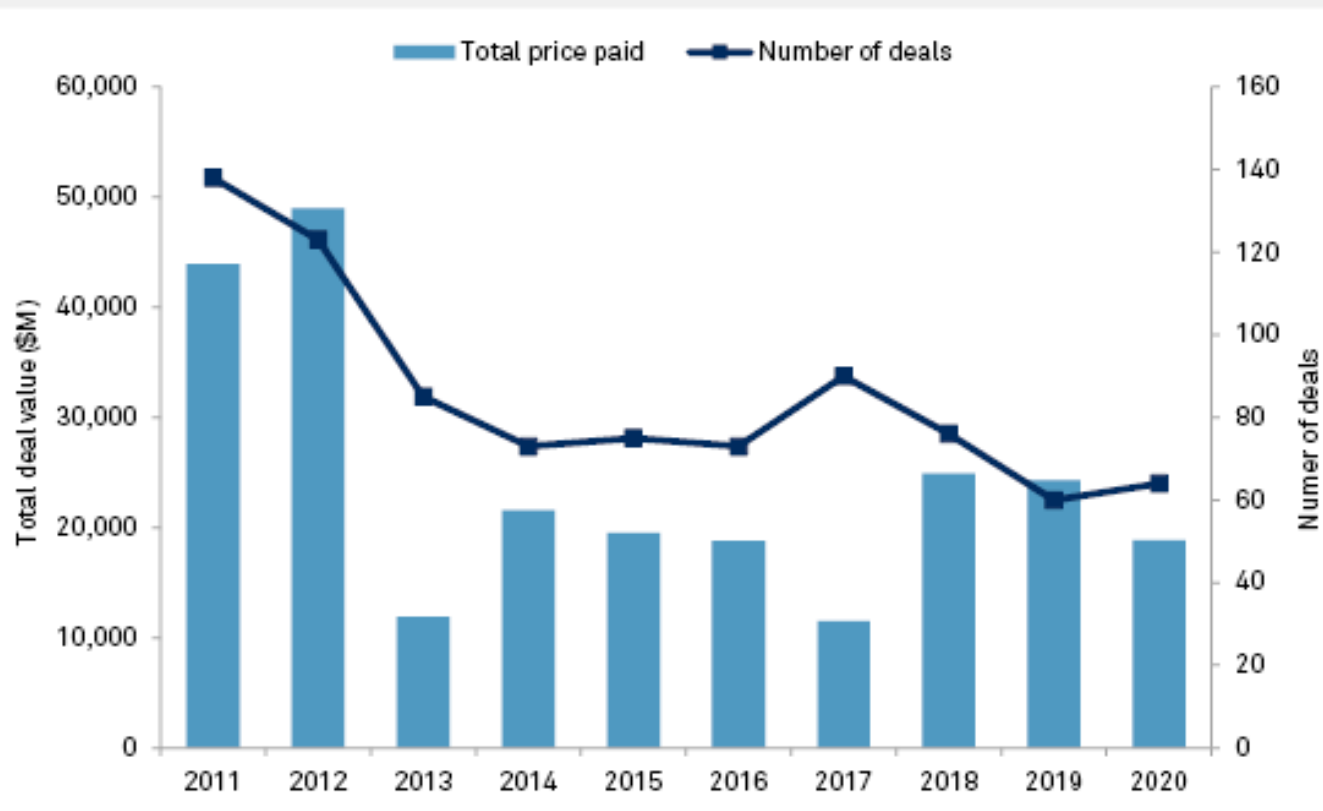
SETTING THE SCENE





MERGERS AND ACQUISITIONS ARE A KEY PART OF THE MINING INDUSTRY

Deal value* and number of deals, 2011-20



Data as of March 18, 2021.

* \$10 million minimum deal value.

Includes completed and pending deals as of data compilation date in each following year.

Source: S&P Global Market Intelligence



WHICH CAN LEAD TO LARGE GAINS

COAL APRIL 8, 2011 / 1:58 AM / UPDATED 10 YEARS AGO

UPDATE 2-Rio Tinto gains control of Riversdale Mining

By Reuters Staff

3 MIN READ



- * Rio to accelerate Riversdale's coking coal projects
- * Rio to appoint more executives to Riversdale board
- * Riversdale shares close at A\$16.52 (Adds detail)

SYDNEY, April 8(Reuters) - Global miner Rio Tinto won control over Riversdale

Economy

Rio, Chinalco in JV deal to develop Africa project

(Xinhua)
Updated: 2010-03-19 14:50

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SYDNEY - Rio Tinto, the giant mining company, struck a deal with Aluminum Corporation of China (Chinalco) on Friday to develop the Simandou iron ore reserve in Guinea in West Africa.

The joint venture agreement covers rail and port infrastructure as well as the mine itself, Rio Tinto said in a statement on Friday.

Related readings:

- Don't politicize Rio Tinto trial, China urges
- Chinalco makes fresh overtures to Rio Tinto
- Group of Rio offers additional \$25m for Haiti
- Rio Tinto employees charged with bribery

Rio Tinto owns 95 percent of the Simandou project, with another five percent owned by the World Bank.

According to the agreement, Chinalco will acquire a 47 percent interest in the project by providing 1.35 billion Australian dollars in an earn-in basis through sole funding of ongoing development during the next two to three years.

"We have long believed that Rio Tinto and Chinalco could work together on major projects for mutual benefit," Rio Tinto's Chairman Tom Albanese said in a statement.



MINES

Endeavour-Semafo : un mariage à 640 millions d'euros bouleverse les mines africaines

JA RÉSERVÉ AUX ABONNÉS | 24 mars 2020 à 11h47 | Par *Christophe Le Bec*

Mis à jour le 30 mars 2020 à 13h03



texte de recherche



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LANGUES

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MENU AUDIO ▾

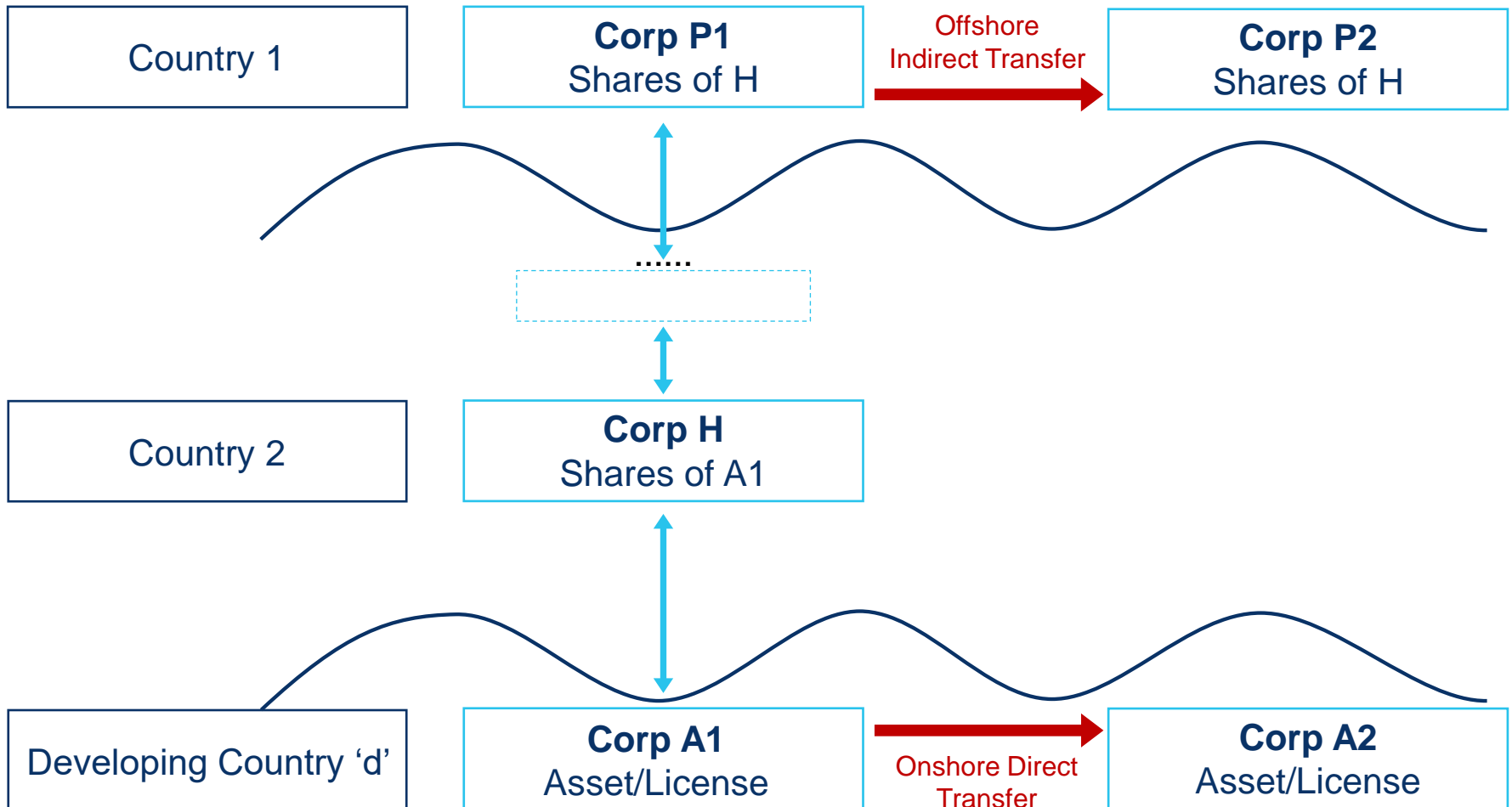
MENU VIDÉO ▾

Freeport-McMoran cède une mine congolaise à un groupe chinois pour 2,6 milliards de dollars





DEFINITIONS





TAX TREATIES ATTRIBUTE CAPITAL GAINS TAXING RIGHT TO THE SOURCE COUNTRY

Article 13 of UN Model Treaty Convention – latest version

Article 13. Capital Gains

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

(...)

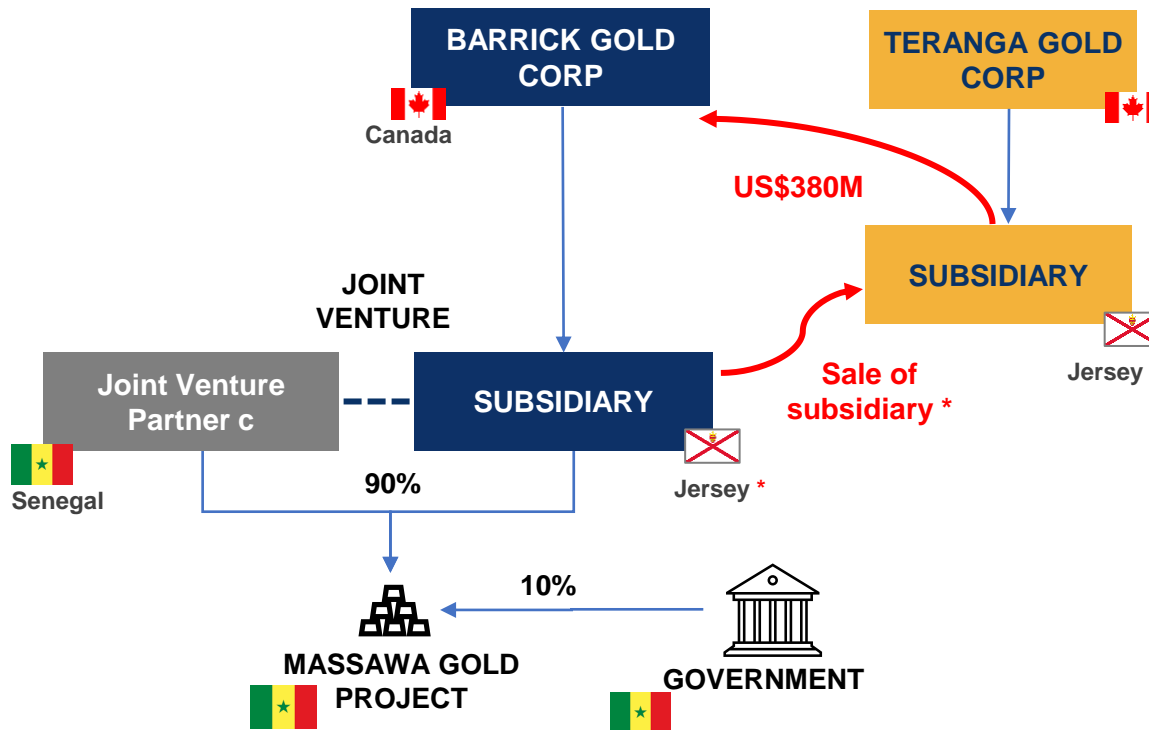
4. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State.

5. Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the alienation of shares of a company, or comparable interests, such as interests in a partnership or trust, which is a resident of the other Contracting State, may be taxed in that other State if the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least ___ per cent (the percentage is to be established through bilateral negotiations) of the capital of that company or entity.

6. Gains derived by a resident of a Contracting State from the alienation of a right granted under the law of the other Contracting State which allows the use of resources that are naturally present in that other State and that are under the jurisdiction of that other State, may be taxed in that other State.



SENEGAL: ACQUISITION OF MASSAWA GOLD MINE (2020)



(*) Although the domicile of the subsidiary was not disclosed in the press releases, by reviewing the corporate structure of both groups, we believe that the target entity was domiciled in Jersey.

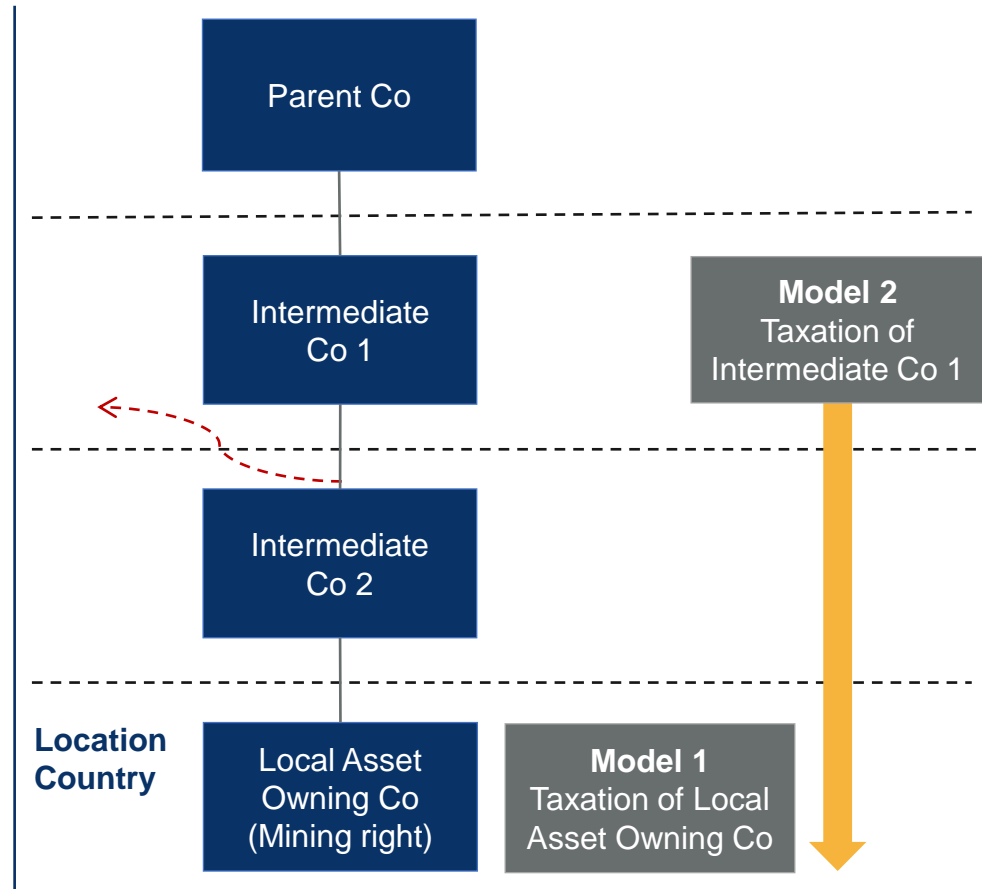
**HOW TO
ESTABLISH THE
TAX LIABILITY
AND RETAIN THE
RIGHT TO TAX
OFFSHORE
INDIRECT
TRANSFERS**





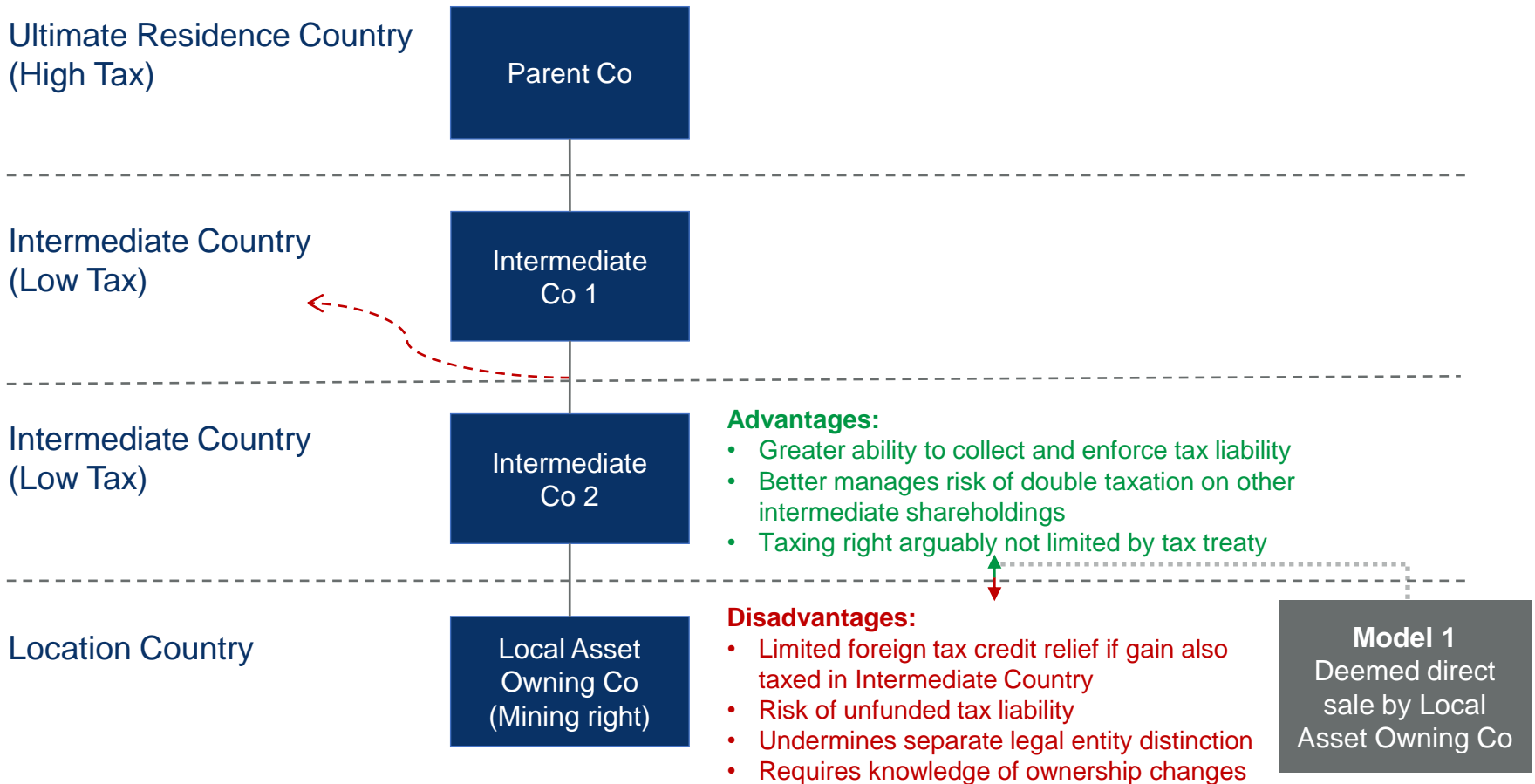
CURRENT IMPLEMENTATION APPROACHES IN LAND-BASED MINING

- Tax liability rules
 - **Model 1** – taxation of a deemed direct sale by a resident
 - **Model 2** (most used) taxation of the non-resident seller
- Enforcement/collection
 - Detect – notification/reporting requirements
 - Collect – withholding; imposing tax payment obligation
 - Enforce – legal protections



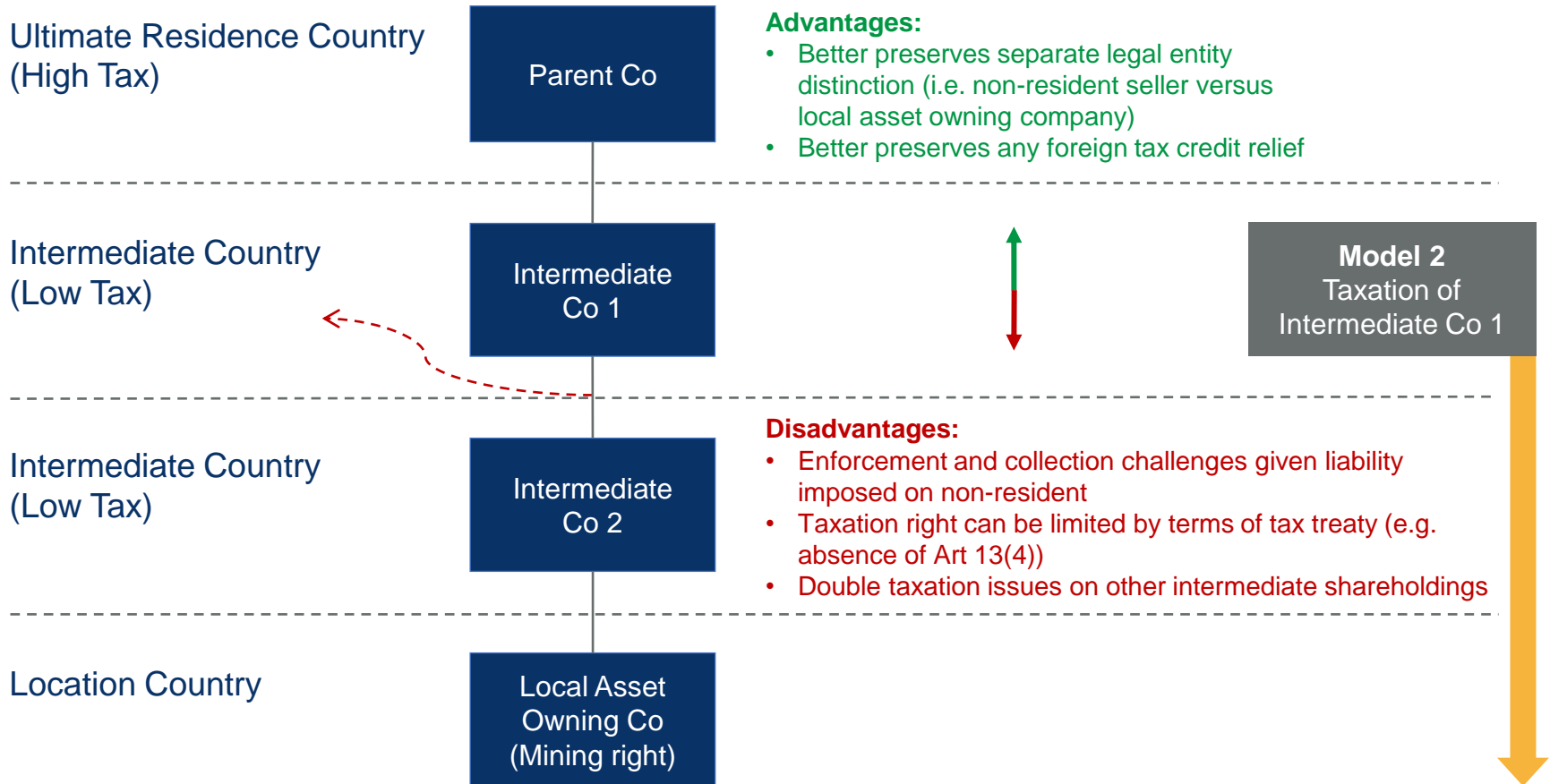


MODEL 1





MODEL 2





CONCEPT OF IMMOVABLE PROPERTY IS CRITICAL

- An appropriate definition of “immovable property” is critical for the effective application of the chosen tax liability rule and associated enforcement and collection rules.
- Resource-rich countries should include the following items in their domestic law definition of immovable property:
 - Any right to explore or mine mineral deposits in the source state.
 - Any right to an amount computed by reference to the production, including profit, from or to the value of production from mineral deposits in the source state.
 - Specify that the mining asset or right is situated where the immovable property is located. This avoids any doubt about the source state’s right to tax income derived from mining activities or assets linked to immovable property.

ADMINISTRATION AND ENFORCEMENT ISSUES





VALUING MINING ASSETS AND LICENSES

There is no single value for a company or asset, since this depends on the expectations and perceptions of those who make the projection and conduct the valuation.

There are industry standards on valuation of mineral or oil and gas properties.



Standards, Best Practices & Guidance for
Mineral Resources & Mineral Reserves

IIMA

International Institute of Minerals Appraisers

The IIMA has established standards of education, experience, and professional conduct to protect the public from unprofessional practices.



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VALUATION OF EXTRACTIVE INDUSTRIES' ASSETS

Countries with a large extractive sector might want to provide guidance on mining asset valuation in regulations. Examples:

- **General valuation requirements:**

- Australia: <https://www.ato.gov.au/Individuals/Capital-gains-tax/In-detail/Market-valuation-for-tax-purposes/?anchor=Meaningofmarketvalue#Meaningofmarketvalue>

- USA: Valuations of Oil and Gas Producing Properties - https://www.irs.gov/irm/part4/irm_04-041-001

- **Specific mineral valuation guidance:**

- Western Australia: www.wa.gov.au/government/publications/duties-cp-da42

- Mongolia: an official “methodology for calculating the value of a mineral license and imposing tax on income from license transfer”, Annex I and II to the Decree No. 302 of the Minister of Finance, 2019.

- Zambia: Property Transfer Tax – mineral rights valuation guidance in progress



ENFORCEMENT OPTIONS

- a) Notification/reporting and information exchange mechanisms;
- b) Withholding tax mechanisms (e.g. on payment of the purchase price);
- c) Mechanisms imposing a tax payment obligation on a relevant local entity (e.g. as agent of the non-resident seller);
- d) Advance ruling systems
- e) Other legal protections such as restricting the registration, renewal or validity of relevant underlying assets (e.g. extractive licenses) unless applicable notification requirements have been met and/or satisfactory arrangements have been made for the payment of that tax.



EXAMPLE OF REPORTING REQUIREMENTS

In Tanzania, the Income Tax Act provides that taxpayers must report transactions before and after the change of ownership:

Tanzania - Income Tax Act (Chapter 332)

56. (1) Where the underlying ownership of an entity changes by more than fifty percent as compared with that ownership at any time during the previous three years, the entity shall be treated as realising any assets owned and any liabilities owed by it immediately before the change.

(...)

*(5) The entity shall have the duty to report to the Commissioner immediately **before** and **after** the changes referred to under subsection (1) have occurred.*

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